No. 86 1864

Supreme Court, U.S.
FILED
MAY 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID COLAN,

Petitioner,

vs.

CUTLER-HAMMER, INC.,
EATON CORPORATION
and KOPPERS COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When deciding a motion for summary judgment, what are the standards a court should use in the weighing process to determine if facts submitted by a nonmovant supporting the existence of a secret agreement are insufficient to overcome movant's submission of express denials of the secret agreement so as to find that no genuine issues of material fact exist?

2. When deciding a motion for summary judgment, may the court properly disregard documents submitted by the nonmovant that the court anticipates would be inadmissible as evidence at trial?

3. In an action seeking recovery of §16(b), short-swing profits arising from an insider's sale of shares occasioned by a corporate merger, is the sale for §16(b) profit purposes completed when all significant preconditions to the merger have been fulfilled (thus making the closing of the merger a foregone conclusion) or, since the insider possibly could have sold its stock position subsequent to fulfillment of these merger preconditions, can the §16(b) sale occur only when the merger is closed?

LIST OF PARTIES

Petitioner, Plaintiff:

David Colan

Respondents, Defendants:

Cutler-Hammer, Inc.
Eaton Corporation
Koppers Company, Inc.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on February 24, 1987.

CITATION TO OPINION BELOW

The panel opinion of the Court of Appeals is reproduced in Appendix A, pp. 1a-24a and is reported at 812 F.2d 357 (7th Cir. 1987).

JURISDICTION

The panel opinion was entered on February 24, 1987. Rehearing was denied on March 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

The statutory provision involved is §16(b) of the Securities Exchange Act of 1934 reproduced in Appendix B at p. 3b and Rule 56, Federal Rules of Civil Procedure reproduced in Appendix B at p. 1b.

STATEMENT

A.

Plaintiff, an Eaton Corporation shareholder, brought this action pursuant to §16(b) of the Securities Exchange Act of 1934 against Koppers Company, Inc. to recover the substantial short-swing profits realized by Koppers through its purchases and sale of Cutler-Hammer, Inc. stock.

A motion to dismiss filed by Koppers was denied, 516 F.Supp. 1342 (N.D. Ill. 1981) and subsequently Koppers moved for summary judgment. In May 1986, the district court granted Koppers' motion and dismissed plaintiff's complaint, which the Seventh Circuit affirmed, *per curiam*, pp. 1a-24a, 812 F.2d 357. The facts as adduced by the peti-

tioner, the nonmovant in the summary judgment proceedings, follow.

In March 1978 Cutler-Hammer became the target of a takeover attempt by Tyco Laboratories. Late in that same month, Edmund Fitzgerald, Chairman of Cutler-Hammer, approached Fletcher Byrom, Koppers' Chairman, to interest Koppers in making a substantial investment in Cutler-Hammer. A few days later Koppers met with Cutler-Hammer's investment bankers, Morgan Stanley. On April 10, 1978, Koppers purchased 650,000 shares of a new class of Cutler-Hammer preferred stock at $45 per share. In addition, between April 10 and April 14, Koppers purchased an additional 742,500 shares of Cutler-Hammer common stock on the open market at an average price of about $44. In sum, Koppers acquired 21% of Cutler-Hammer at a cost of over $60 million. In coming to Cutler-Hammer's aid, Koppers acted as Cutler-Hammer's "white knight."

Prior to the time Koppers acquired its stake in Cutler-Hammer, Tyco Laboratories had acquired 33% of Cutler-Hammer's stock. Thus, in April 1978 a majority of Cutler-Hammer's shares were in the blocks held by Koppers and Tyco.

In May, 1978 Eaton, through its investment banker, Lehman Brothers, approached both Tyco and Koppers to determine if Eaton could purchase their respective blocks of Cutler-Hammer stock. Since Koppers had acquired its interest in Cutler-Hammer only two months previously, Koppers refused since any sale of its shares (or even an option for sale) would expose it to §16(b) liability for short-swing profits.

Tyco, however, agreed to sell its Cutler-Hammer holdings to Eaton and on June 12, Eaton acquired Tyco's 33%

interest in Cutler-Hammer for $55 a share. Cutler-Hammer acknowledged that Eaton, now holding 33% of its outstanding stock and with vast financial resources, was likely to be successful if it sought to acquire undisputed control of Cutler-Hammer. Cutler-Hammer thus entered into merger negotiations with Eaton.

On June 28, 1978, the Boards of Eaton and Cutler-Hammer approved a Merger Agreement. The Merger Agreement called for a price of $58 per share to be paid all remaining Cutler-Hammer shareholders in a two step transaction. First Eaton would make a tender offer for Cutler-Hammer shares at $58 and the Cutler-Hammer Board agreed to recommend to its shareholders that they tender their shares in response to Eaton's tender offer. Second, for those shareholders who did not tender, there would be follow-up merger which would "mop-up" the remaining public shareholders by payment of $58 cash or notes of equivalent value.

Closing of the Merger Agreement was conditioned upon several matters, including (i) approval by Cutler-Hammer shareholders, (ii) registration with the Securities and Exchange Commission of the notes to be used in the merger, (iii) filing of a proxy statement, (iv) absence of Federal Trade Commission and Justice Department disapproval, (v) absence of materiai litigation and, (vi) opinion letters from counsel regarding validity of the transaction from a corporate law standpoint.

In July 1978, as scheduled, Eaton tendered for additional shares of Cutler-Hammer common stock at the price of $58 per share. By the conclusion of the tender offer on August 7, 1978, Eaton had acquired a 62% interest in Cutler-Hammer, thereby acquiring sufficient shares to vote approval of the merger.

At this point, conflicting interests developed over the timing of the merger. Eaton's interests were served by quickly consummating the merger. Since it was still within the six month period from the date of Koppers' purchases of Cutler-Hammer shares, Eaton could lower its acquisition costs by recapturing the §16(b) profits that Koppers would realize on the merger. It could also mesh Cutler-Hammer's personnel into Eaton as quickly as possible. On the other hand, Koppers was equally interested in delaying the merger beyond the six month date so that it would keep its short-swing profits. Edmund Fitzgerald, who by this time was Cutler-Hammer's Chairman, *and* a director on Koppers' Board, *and* a Board director of Eaton, had conflicting loyalties.

In mid-August, the Cutler-Hammer shareholders' meeting to approve the merger was scheduled for October 2 but Mr. Fitzgerald was given the authority to reset the meeting as he saw fit. In late September, Mr. Fitzgerald cancelled the October 2 shareholders' meeting; the shareholders' meeting was subsequently held on December 14, and the merger was approved. On January 2, 1979, the merger was closed.

B.

Petitioner alleged that although the merger was closed on January 2, 1979, a date outside of the short-swing six month period, Koppers had sold its Cutler-Hammer shares in mid-August 1978 because of a secret agreement between Koppers, Cutler-Hammer and Eaton. This secret agreement, petitioner asserted, fulfilled the only significant unfulfilled condition to the merger, i.e., no material litigation, and that in a merger it is when all significant preconditions have been fulfilled (and not when the merger is closed) that the §16(b) sale takes place. Petitioner, the

summary judgment nonmovant, demonstrated that the remaining conditions to the merger were not significant for purposes of §16(b) since they: (a) could be waived by Cutler-Hammer which was then absolutely controlled by Eaton, or by Eaton, (b) were fulfilled or (c) in a practical sense did not affect the market risk Koppers had with respect to its block of Cutler-Hammer stock.[1]

The following is a brief description of some of the support furnished by petitioner advancing his position that Koppers, Eaton and Cutler-Hammer had entered into a secret agreement to delay the merger to a date beyond Koppers' §16(b) period and thereby allow Koppers to keep its short-swing profits. And, in return for giving up a claim for this money, Eaton received a smooth, litigation-free merger.

---

[1] The remaining conditions precedent to the merger—shareholder approval, S.E.C. approval of certain filings, absence of F.T.C. and Department of Justice disapproval and opinion letters from counsel—were no longer significant preconditions in that they were either nothing more than technicalities by August 23 or they were easily satisfied. The required shareholders' meeting and vote was rendered immaterial prior to August 23 since by the time it concluded its tender offer, Eaton held 62% of the outstanding stock. It therefore controlled enough votes to (a) compel a shareholders' meeting and (b) vote approval of the merger. The effectiveness order required from the S.E.C. was similarly not material by August 23. Cutler-Hammer's counsel testified that a sophisticated filer like Eaton could have the appropriate documentation prepared, filed and approved in two to six weeks and that normally the registrant suggests an effective date to the S.E.C. Clearances from the F.T.C. and the Department of Justice were also immaterial by August 23. Various defendant witnesses described these filings as "boiler plate" and "technicalities." Finally, the required opinion of counsel and certificate from the president were not material conditions by August 23. First, Eaton had the contractual right to waive this condition. Second, the opinion and certificate were nothing more than boiler plate attestations that Cutler-Hammer was lawfully and validly existing and operating as a corporation.

Documentary/Testimonial Evidence

1. Originally scheduled in late September or early October 1978, the consummation of the merger of Cutler-Hammer into Eaton was reset for January, 1979. Petitioner submitted that from the following evidence, a jury could conclude that the merger was delayed as a result of negotiations and an "informal" arrangement between Eaton and Koppers.

An Eaton acquisition executive's memo noted:

> "(1) Want an informal arrangement. No formal agreement. They want Peterson's agreement to extend the closing date but they don't want Eaton's agreement—merely assurance that he, Peterson, is confident he can get it."

and added in another note:

> "Companys know each other. Why not agree we won't have an agreement. We are working with reasonable people."

Eaton's advisor was stumped as to justification for a delay in the merger and his notes state that "We need a reason not to proceed. . . What the hell is the reason?" The negotiations continued and ripened into an off-the record agreement; thus the Eaton acquisition executive notes show:

> "Peterson wants to know what we say next December. . . *Informal undertaking* between Miller [Koppers' advisor] and Peterson [Eaton's advisor]?" (emphasis added)

And Eaton's advisor wrote in his notes of the transaction:

> "Cochran [Koppers' in-house counsel]
>
> *Verbal assurance*
> No. 16(B) problem

> Lawyer in Milwaukee [Koppers' local counsel]
>
> Cutler-Hammer's lawyer had agreed." (emphasis added)

adding in notes of communications with Koppers' advisor:

> "Eaton file
> Paul Miller
> Departure Mode
> 2 comments:
>
> 1. Line of communication through counsel. Ask counsel in Milwaukee [Koppers' local counsel].
> 2. Informal—willing
> 3. Closing."

This advisor had earlier noted:

> "3. Informal discussions tell you that I would strongly recommend (*client agrees*) extension. FB [Byrom of Koppers] and PM [Miller, advisor to Koppers] know PGP [Peterson, Eaton's advisor]." (emphasis added)

This document was explained by its author as meaning:

> "I suppose what it means, I guess, it's a presumption, that both Fletcher Byrom and Paul Miller know me, and that if I tell them I would strongly recommend whatever this is, that I would indeed do it. . . [the subject matter of the discussion] *sounds like a discussion about the length of an extension . . . [an extension of] when the deal might close* or when the meeting might be held. . . [Cutler-Hammer] shareholders meeting." (emphasis added)

Other documents from the files of Eaton's advisor could also lead the jury to decide that the parties were negotiating and that those negotiations led to the agreement to defer the consummation of the merger to enable Koppers to retain its insider profits. The following are examples of these documents authored by Eaton's advisor:

> "Some point in the future delaying—six months."
>
> "Bloody Effort—Look at the close out after 16B—Get past 16B:"
>
> "Pelisek [Cutler-Hammer's counsel in Milwaukee]—to Spector [Koppers' general counsel] Eaton [will] give careful consideration re: timing of the merger to Koppers."
>
> "What can be done—meet the 16B needs of Koppers."

Eaton's own internal documents also calculate the cost of "delay." Thus, Eaton prepared charts measuring the cost to Eaton of:

> "Delay to after Koppers 16B period, 10-15-78"
>
> "Delay to Dec. (if K believes 16B period is related to conversion) 12-31-78"
>
> "Delay to permit Koppers capital gains treatment 4-15-79"

Koppers' advisor, Miller, had told Eaton's advisor that

> "We would do whatever we could to avoid a closing prior to that [16(b)] date."

From the foregoing, petitioner believes that a fact finder could conclude that Eaton and Koppers were negotiating and eventually agreed to defer the merger consummation to a date that would satisfy Koppers that it could retain its short-swing profits. The parties themselves variously called it an "informal arrangement," an "informal undertaking," or "verbal assurance," to delay the closing.

2. The Cutler-Hammer/Eaton merger was originally scheduled to be closed in late September or early October 1978 and if it closed as scheduled, Koppers would have had to return its short-swing profits to Cutler-Hammer. Cutler-Hammer's outside counsel testified:

> "*I think that (October 2, 1978) was a target date that I probably said would be met*, met if everybody got going. . ." (emphasis added)

The initial target date for filing proxy and prospectus materials with the S.E.C. was August 8, 1978.

The minutes of the August 23, 1978 meeting of the Cutler-Hammer Board of Directors set the stockholders' meeting to approve the merger as October 2, 1978—well within the §16(b), six month period. Most telling, however, is a memo written by a subordinate to Eaton's investment advisor on August 3, 1978:

> "Eaton and Jones Day [Eaton's attorneys] hope to complete the proxy material next week and be ready to file it with the SEC around August 14th which would mean they could mail around September 1st and *have the stockholders' meeting and merger by September 29th, well before the earliest date (October 15) Koppers could arguably be free of its 16(b) problem.*" (emphasis added)

3. The merger transaction was reset to a date beyond the §16(b) six month period as a result of discussions between the investment advisors to Eaton and Koppers.

Eaton's investment advisor testified that initially Eaton "desir[ed] to close it as promptly as possible, so that Eaton could get all the economic benefits of merging of the firms" but that the closing date was "reset". He added: "I don't recall explicit discussions [about the subject matter of delaying the closing to satisfy Koppers' §16(b) concerns] but . . . I am willing to assume that there were such discussions about delaying it until we were sure and they were sure that this was not a problem."

And Koppers' advisor testified:

> Q. "Did Mr. Peterson [Eaton's advisor] suggest to you that the closing was then scheduled on a date which would put Koppers' short swing profits in jeopardy?
>
> A. ". . . I do recall, when I then got back from vacation, a meeting learning that *Eaton had scheduled*

a closing which would have given us a problem. . ." (emphasis added)

Koppers' advisor also related that:

A. "I learned then, or subsequently that Eaton *had scheduled a closing which would give us a problem. . .*

Q. "Did anyone, to your knowledge, do anything about it?

A. "*In our attempt to be helpful, I believe there were lots of communications* then running between Koppers, Eaton, Cutler-Hammer, directly, in which I wasn't involved. . ." (emphasis added)

Circumstantial Evidence

Petitioner also argued to the lower courts that there was sufficient circumstantial evidence from which a fact finder could infer an agreement. Koppers had purchased its Cutler-Hammer stock in April 1978 as a "white knight" to assist Cutler-Hammer fend off Tyco, an unwanted suitor. The chairman of Cutler-Hammer, Fitzgerald, was also a Koppers' director. By mid-August 1978, Fitzgerald was a director of the boards of directors of Cutler-Hammer, Koppers and Eaton. Also, by mid-August 1978 Eaton owned 62% of Cutler-Hammer's outstanding stock and Koppers, as a result of its efforts as a "white knight," owned about 21% of Cutler-Hammer.

With this background, several events support the inference that Eaton and Koppers had arrived at an agreement to delay the closing of the merger, and were acting in conformance with their agreement.

First, in late August 1978 Fitzgerald was formally given the sole power by the Cutler-Hammer board to reset the date of the Cutler-Hammer stockholder vote on the merger. At that point Eaton controlled Cutler-Hammer and although the stockholder meeting had been originally set for early

October 1978 (a date that put Koppers' insider profits in jeopardy), Fitzgerald, a Koppers director and friend of Koppers' chairman, was given power to defer the meeting—a power which he exercised, and he deferred the meeting to December 1978 (a date well beyond the six month period in §16(b)). Further, Fitzgerald had turned to Koppers to fend off Cutler-Hammer's unwanted suitor, Tyco, and Koppers had helped by buying 21% of Cutler-Hammer's shares. Fitzgerald had motive to return a favor and assist Koppers in its attempt to keep its insider profits.

Second, the fourth quarter, 1978 Cutler-Hammer dividend was omitted without objection from Koppers—a dividend that had been paid regularly and without interruption since 1939. It can be inferred that this was one of the economic justifications needed to "sell" the agreement to defer the merger closing.

Third, although Eaton and Cutler-Hammer both initially tried to expedite S.E.C. processing, their haste evaporated sometime in August. In late July 1978, Eaton's counsel forwarded the draft S-14 registration and proxy statement, stating that the target date for the filing of the S-14 was August 8, and adding "We require this information returned to us *as soon as possible.*" (emphasis added) However, *after* agreement was reached in August 1978 to delay the merger closing, Eaton's counsel, in late September, 1978, wrote:

> "Attached please find the SEC comments on the Eaton/Cutler-Hammer registration statement. Although *there is no great rush to file our amendment,* please review these comments . . . at your convenience." (emphasis added)

This circumstantial evidence standing alone would permit a fact finder to conclude that Eaton, Koppers and Cutler-Hammer entered into an agreement to delay the merger.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD CLEARLY ARTICULATE THE STANDARDS TO BE USED BY LOWER COURTS WHEN DETERMINING WHETHER A NONMOVANT ASSERTING THE EXISTENCE OF A SECRET AGREEMENT OR COVERT CONCERTED ACTION HAS SUFFICIENTLY DEMONSTRATED THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT.

This case is a modern day counterpart of *Adickes v. S. H. Kress & Company*, 398 U.S. 156 (1970) in which the inference of a secret agreement between the police and a store owner was sufficient to preclude summary judgment. While the lower courts mouth settled law that on a motion for summary judgment, the movant must show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law only after showing the absence of a genuine issue, in view of the recent opinions in *Celotex Corp. v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548 (1986) and *Anderson v. Liberty Lobby*, ____ U.S. ____, 106 S.Ct. 2505 (1986) confusion has developed. Lower courts have seized upon summary judgment as a way to clear court dockets and thus clarification is imperative.

As recently articulated by this Court in *Celotex*, the movant can seek to discharge its initial burden in one of two ways: (i) submit affirmative evidence negating an essential element of the nonmovant's claim or (ii) demonstrate that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Celotex* at 2557 (Brennan dissenting). If the moving party makes a *prima facie* showing, then the burden shifts to the nonmovant to produce materials demonstrating the existence of a genuine issue of material fact. The ques-

tion left open by *Celotex* is, after the movant has made a *prima facie* showing, what degree of persuasion must the nonmovant fulfill to avoid summary judgment. *Liberty Lobby* purported to leave the burden on the nonmovant unchanged from the standards articulated in *Adickes*, but there are other, apparently conflicting, passages in the opinion that appear to raise the nonmovant's burden. Lower courts have misunderstood this language to signal a change in summary judgment standards and a departure from *Adickes*. Nowhere is this more confusion apparent than in the instant case.

The central factual issue in the case before the lower court was whether Koppers, Eaton and Cutler-Hammer reached a covert agreement to delay the Eaton/Cutler-Hammer merger so as to allow Koppers to retain its short swing profits. If the parties did reach such an agreement within the statutory limit for §16(b) liability, then liability for short swing profits would attach.

Koppers moved for summary judgment essentially on the ground that there was no agreement, secret or otherwise. In support of its motion, Koppers cited and relied upon deposition testimony from most of the merger negotiation participants that no agreement was ever made. With this showing, under *Celotex*, Koppers met its initial burden of making a *prima facie* showing it was entitled to summary judgment, because it had set forth evidence negating an essential element of plaintiff's claim—the secret agreement. The burden thus shifted to petitioner to demonstrate the existence of a genuine issue on that point. Petitioner sought to discharge this burden by providing the court with materials, some of which are summarized at pp. 2-12, *supra*. From this evidence, petitioner believed a fact finder could infer the existence of an agreement between Eaton, Koppers and Cutler-Hammer. In view of petitioner's material, existence of the secret agreement should be resolved by the jury.

The district court and subsequently the Seventh Circuit considered and rejected the petitioner's proffered demonstration of an agreement, characterizing it as scant and equivocal. In so doing, the Court of Appeals appears to have misperceived the scope of this Court's holdings in *Celotex* and *Liberty Lobby*. It construed *Liberty Lobby* as an invitation to weigh competing evidence and resolve disputed fact issues. For example, the court decided that there was no secret agreement, after deciding that petitioner's proffered evidence was "equivocal," "internal speculations" and "flitting thoughts" by their authors. The court found the defendants' deposition denials of the agreement more compelling than the documents cited to the court by petitioner. In short, the court resolved credibility issues.[2]

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[2] The complete discussion by the court on the parties' competing evidence was as follows:

> "Colan primarily relies on the notes of Peterson of Lehman Brothers, Brown of Eaton, Robert Crease of Eaton, and Paul Miller of First Boston as evidence of the negotiation and consummation of a secret agreement between Eaton and Koppers to delay the merger. However, these notes are equivocal at best as to the negotiation and existence of such a secret agreement. Also, both Peterson and Brown stated under oath in their depositions that their notes reflect internal speculations and 'flitting' thoughts, as well as conversations with other officers and bankers concerning business transactions. More importantly, Peterson, Brown and Miller, again under oath in their depositions, testified that, to the best of their knowledge, there was no agreement between Koppers and Eaton to delay the merger for the purpose of allowing Koppers to retain its §16(b) profit. It is inconceivable that there could have been such an agreement without their knowledge.
>
> "In contrast to Colan's scant, equivocal 'evidence' of the negotiation and consummation of a secret agreement between Koppers and Eaton, Koppers points out that every person who had a significant role in the merger of Eaton and Cutler-Hammer, including DeWindt, Byrom, Fitzgerald, Peterson and

(Footnote continued on following page)

The court also rejected all petitioner's circumstantial evidence that the parties behaved consistent with their having reached an agreement to delay. It did so by accepting Koppers' contentions that the parties had other reasons to explain delaying the merger. At page 9 of its opinion, the court concluded:

> "The depositions also demonstrate, and Colan admits, that Cutler-Hammer desired to delay the merger until January of 1979, at least in part because a new capital gains tax law would take effect at that time." (A.15a)

Stated another way, the court considered the circumstantial evidence proffered by petitioner and drew inferences in favor of the defendants and against petitioner.

In *Liberty Lobby* this Court determined that a motion for summary judgment implicates the burden of proof applicable at trial. In the case at bar, the Court of Appeals misperceived the scope of *Liberty Lobby*. *Liberty Lobby* has been used as an invitation to weigh competing evidence and resolve disputed factual issues. In practical effect, therefore, the Court of Appeals has abandoned *Adickes* and raised the nonmovant's burden of proof in response to a summary judgment motion.

As this Court noted repeatedly in its decision, *Liberty Lobby* was not intended to signal a departure from the standards articulated *Adickes*. However there is some in-

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[2] *continued*

Miller, has expressly denied under oath that Koppers and Eaton reached an agreement or understanding with respect to the timing of the merger. The depositions of these individuals demonstrate that, instead of secretly agreeing to delay the merger, Eaton officials considered what Koppers might do to protect its profits, and Koppers communicated to Eaton that it would protect its interests." (A.13a-15a)

ternal tension within *Liberty Lobby*. The majority indicated at several points that its opinion did not signal a change in summary judgment standards. For example, it cites and relies upon *Adickes* as a correct statement of the law, 106 S.Ct. at 2511, fn. 5-6, 2513, and it directs lower court judges not to weigh the evidence. 106 S.Ct. at 2511. The opinion admonishes judges not to conduct paper trials:

> "It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." 106 S.Ct. at 2513.

Interspersed with these passages, however, are other passages that seem to suggest that *Liberty Lobby* does indeed herald a change in summary judgment standards. It describes the nonmovant's burden as one to produce sufficient facts so that a reasonable jury could find for the nonmovant. 106 S.Ct. at 2510. The opinion also states that evidence that is "merely colorable" or "is not significantly probative" will not be enough for the nonmovant to avoid summary judgment.

In his dissent, Justice Brennan noted this inconsistency in the majority's opinion. Justice Brennan wrote: "I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts. . . ," 106 S.Ct. at 2519; later at p. 2519 he observed:

> "I simply cannot square the direction that the judge 'is not himself to weigh the evidence' with the direction that the judge also bear in mind the 'quantum' of proof required and consider whether the evidence is of sufficient 'caliber or quality' to meet that 'quantum.' I would have thought that a determination of

> the 'caliber and quality,' i.e., the importance and value, of the evidence in light of the 'quantum,' i.e., amount required could *only* be performed by weighing the evidence." (emphasis in original)

While summary judgment should not be an invitation for the judge to weigh evidence and resolve factual issues but merely to decide if actual issues exist, the Court of Appeals in this case read *Liberty Lobby* more broadly and improperly weighed the parties' competing evidence. For example, the Court of Appeals approved of the determination that various witness' testimonial denials that there was a secret agreement were more persuasive than their written notes about reaching an agreement, A.15a, and that the defendants' explanations for delaying the merger until after January 1, 1979 were more persuasive than plaintiff's. A.15a. In short, the Seventh Circuit concluded that the evidence favored defendants and that, under *Liberty Lobby*, they were entitled to resolve the case on that basis.

This Court should correct this misapprehension over the scope of *Liberty Lobby* and, in so doing, it should articulate the burden imposed on the nonmovant in responding to a motion for summary judgment.

II.

THIS COURT SHOULD DETERMINE THE QUALITY OF THE DEMONSTRATION A NONMOVANT MUST PRODUCE AND CLARIFY THAT FACTS WHICH MAY BE INADMISSIBLE AT TRIAL MAY NEVERTHELESS BE USED TO DEMONSTRATE AN ISSUE OF FACT FOR SUMMARY JUDGMENT PURPOSES.

The Court of Appeals approved of the district court decision, in part, upon the ground that documents written by two of the major participants in the merger ne-

gotiations were inadmissible as trial evidence and thus could be disregarded in determining whether the nonmovant had raised an issue of fact. The documents were characterized as "incomplete, unreliable and ridden (sic) with hearsay statements". A.14a, fn.14. Such a determination misperceives the scope of Rules 56(c) and (e), F.R.C.P., which direct a party to resist a motion for summary judgment by setting forth specific facts showing that there is a genuine issue for trial. The Court of Appeals has taken an erroneously restrictive construction of Rule 56(c) and concluded that because the notes would not be admissible at trial in their present form, the court was free to ignore the notes and the inferences from them.

This Court has held that the nonmovant is not required to produce evidence in a form that would be admissible at trial. *Celotex* at 2553, 2560. Further, the nonmovant is directed by Rule 56(e) to produce specific facts showing a genuine issue of material fact, not evidence in admissible form. Thus, the inquiry by the lower courts should be whether the nonmovant has set forth facts establishing a genuine issue. The nonmovant should not be put to the burden at this pretrial stage of proving the facts substantively as though at trial.

The need for clarification on this issue by this Court is highlighted by the result in the instant case. The relevance of the information contained in the notes is plain. These notes make repeated and express reference to an agreement between Koppers, Eaton and Cutler-Hammer to delay the merger date to protect Koppers' §16(b) profits. Thus, by ruling the documents inadmissible, the court excluded substantial evidence demonstrating the existence of an issue of fact as to the negotiation and consummation of the secret agreement.

The test for sufficiency of the nonmovant's evidence should be whether the evidence is probative and whether the evidence could be admissible at trial in any form. This standard is implicit in *Celotex* and should be made explicit. In *Celotex*, respondent sought to avoid summary judgment by producing three documents, two of which were clearly hearsay in their present form. This Court remanded to the Court of Appeals to consider whether respondent's evidence would be sufficient to avoid summary judgment "if reduced to admissible evidence". 106 S.Ct. at 2555. Similarly, for example in this case, plaintiff could call each of the authors of the documents to stand at the trial and question them as to the contents of the documents they wrote, thereby reducing the contents of the documents to admissible evidence.

In light of the lower court's confusion over the form of evidence that the nonmovant must produce in opposition to a summary judgment motion, this Court should grant certiorari to resolve this question left open by *Celotex*.

III.

THERE SHOULD BE RESOLVED THE CONFLICT EXISTING AMONG THE CIRCUITS AS TO WHETHER, IN THE CONTEXT OF A CORPORATE MERGER, A SALE FOR §16(b) SHORT-SWING PROFIT PURPOSES OCCURS (i) WHEN ALL SIGNIFICANT PRECONDITIONS TO THE MERGER HAVE BEEN FULFILLED AND, AS TO PRACTICAL MATTER, EXPOSURE TO MARKET RISK IS NO LONGER BEING TAKEN BY THE INSIDER OR (ii) SUCH A SALE OCCURS ONLY UPON THE CLOSING OF THE MERGER AND ITS EFFECTUATION.

In the case now before this Court, the merger agreement made the merger contingent upon fulfillment of several conditions precedent to the merger: absence of threat

of litigation, shareholder approval, receipt of an effectiveness order from the S.E.C., absence of F.T.C. and Department of Justice disapprovals, and an opinion by counsel. Petitioner contended in the lower courts that, once the parties reached their secret agreement, the only significant precondition to the merger, the threat of litigation, had been disposed of. Petitioner contended that the remaining conditions were not significant or had been effectively disposed of by August 23.[3] Petitioner further contended that, since the merger price and the number of shares held by Koppers were fixed, Koppers no longer had any market risk even though, as a technical matter, it was free to sell its stock to third parties at the then prevailing market, i.e., merger price. From these facts, plaintiff concluded that Koppers had, for §16(b) purposes, effectuated a "sale" of its stock by mid-August 1978, because the impediments to the merger were nothing more than a formality and, with the merger price fixed, Koppers no longer had any market risk.

The lower court rejected this analysis. The Seventh Circuit concluded that even if the secret agreement existed, no sale for §16(b) purposes had taken place. It based this conclusion, in substantial part, on the fact that Koppers was free to sell its Cutler-Hammer stock to third parties at any time until the merger closed. In so ruling, the

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[3] For example, approval by the shareholders was no longer significant because, with 62% of the voting stock, Eaton held the power to (a) compel a shareholder meeting and (b) approve the merger. The S.E.C. filings were routine, so the date of the effectiveness order was literally in the hands of Eaton. Approvals of the merger from the FTC and the Department of Justice were technicalities and little more than boiler plate filings. Receipt of the required opinion of counsel could be waived by Eaton and, in any event, was little more than a technicality.

Seventh Circuit has brought itself squarely into conflict with the opinions of the First and Ninth Circuit Courts of Appeals in *Riseman v. Orion Research, Inc.*, 749 F.2d 914 (1st Cir. 1984) and *Provident Securities Co. v. Foremost-McKesson, Inc.*, 506 F.2d 601 (9th Cir. 1974), as well as one other decision in the Seventh Circuit, *Portnoy v. Revlon, Inc.*, 650 F.2d 805 (7th Cir. 1981).

As in the case at bar, the crucial issue raised in *Foremost-McKesson* and *Revlon*, was whether, in the context of an impending corporate merger, a "sale" for §16(b) purposes had occurred. *Riseman* raised precisely the same issue, although not in the context of a corporate merger; that is, whether a condition precedent to the obligation to purchase was of sufficient magnitude that the purchase did not occur for §16(b) purposes until after the condition was satisfied. To resolve this issue, each of the courts in turn considered when the insider to be charged with §16(b) liability lost its market risk. Thus, if the consummation of the merger was in doubt, or if substantial unfulfilled conditions to the merger existed, then the §16(b) defendant retained market risk and no §16(b) sale occurred.

In the instant case, the Seventh Circuit rejected this analysis. Instead, it considered whether Koppers had the ability to sell its shares at any time prior to the merger closing. It also considered whether any conditions precedent to the merger were unfulfilled prior to the merger regardless of whether they were substantial or merely technicalities. Answering both of these issues affirmatively, the lower court held that no "sale" for §16(b) purposes had taken place. In so doing, the Seventh Circuit has ignored the market risk analysis articulated by the First and Ninth Circuits and the earlier panel opinion in the Seventh Circuit.

This Court should grant certiorari to and resolve this important issue of §16(b) liability; that is, in the context of an impending corporate merger, does a §16(b) sale occur when the party to be charged no longer has, in practical terms, market risk or when the party to be charged is irrevocably bound by the terms of the merger to transfer its stock pursuant to the merger.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

May 22, 1987

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2013

DAVID COLAN,

Plaintiff-Appellant,

v.

CUTLER-HAMMER, INC., EATON CORPORATION, and KOPPERS COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 4118—**John A. Nordberg,** *Judge.*

ARGUED JANUARY 9, 1987—DECIDED FEBRUARY 24, 1987

Before CUMMINGS and FLAUM, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

PER CURIAM. The plaintiff, David Colan, brings this derivative action on behalf of Eaton Corporation, pursuant to § 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78p(b) (1982), to recover short-swing profits allegedly obtained by defendant-appellee Koppers Company through transactions made in 1978 in the stock of Cutler-Hammer, Inc. Due to a merger between these two companies, Cutler-Hammer's assets are now owned by Eaton. The district court entered summary judgment for Koppers and we affirm.

The plaintiff alleges that Koppers and Eaton entered into a secret agreement pursuant to which Eaton would defer the Cutler-Hammer shareholders' meeting and the closing of the merger between Cutler-Hammer and Eaton in order to shield Koppers from § 16(b) liability. The district court rejected the plaintiff's allegations, and granted the defendant Kopper's motion for summary judgment.

On appeal the plaintiff argues that the district court erred in granting summary judgment, because significant issues of material fact existed as to the alleged secret agreement. The plaintiff also contends that the district court erred in its conclusion that, even if a secret agreement existed, there was no sale for § 16(b) purposes, because significant conditions precedent to the closing remained unfulfilled.

After examining the record and the briefs and hearing oral argument, we conclude that the grant of summary judgment in this case was proper. In reviewing a grant of summary judgment we must decide whether the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, No. 86-1638, slip op. at 3-4 (7th Cir. Jan. 16, 1987). We agree with the district court that after drawing all reasonable inferences in the light most favorable to the plaintiff, *see Bartman v. Allis-Chalmers*, 799 F.2d 311, 312-13 (7th Cir. 1986), no genuine issues of material fact exist. Because Judge Nordberg's opinion contains an excellent discussion and analysis of this case, we believe that any additional discussion by this court is unnecessary, and thus we adopt the district court's opinion as our own. The district court's opinion follows in an appendix to this opinion.

AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID COLAN, *Plaintiff,*	)	No. 80 C 4118
v.	)	Judge John A. Nordberg
CUTLER-HAMMER, INC., EATON CORPORATION and KOPPERS COMPANY, INC., *Defendants.*	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, David Colan, brought this action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1982), on behalf of Eaton Corporation ("Eaton"), of which he is a shareholder.[1] Eaton's subsidiary, New CHI, Inc. ("New CHI") is the surviving corporation in the merger of New CHI and Cutler-Hammer, Inc. ("Cutler-Hammer"). Colan brought this action against Koppers Company, Inc. ("Koppers") to recover alleged short-swing profits realized by Koppers upon the purchase and sale of Cutler-Hammer stock during 1978. This matter is now before the court on Koppers' motion for summary judg-

[1] In its Memorandum Opinion and Order dated May 4, 1984, this court held that Colan, as an Eaton shareholder, has standing to bring this suit.

ment.[2] For the reasons set forth below, the court grants Koppers' motion for summary judgment.

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[2] Also before the court are Koppers' motion to strike Colan's memorandum and for other sanctions, and Colan's motion to set a pretrial briefing schedule and to set dates for the pretrial conference and trial. The court denies both of these motions.

In its motion to strike, Koppers argues that Colan's memorandum in opposition to Koppers' motion for summary judgment "is replete with literally scores of false and distorted 'statements of facts' which are not well grounded in fact, but are contradicted by or unrelated to the depositions and documents cited by plaintiff." According to Koppers, Colan's memorandum creates an issue of fact as to the existence of a secret agreement between Koppers and Eaton to delay the merger only through such distortion. Therefore, the court should, pursuant to Fed. R. Civ. P. 11, strike Colan's memorandum, impose Koppers' expenses and attorneys fees incurred in responding to Colan's memorandum against Colan, and award Koppers such relief as the court deems just and proper.

Rule 11 provides:

> Every pleading . . . shall be signed by at least one attorney. . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include . . . the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

The test under Rule 11 is objective: litigation must be grounded in an objectively reasonable view of the facts and the law, and, if it is not, the lawyer or party proceeding recklessly must foot the bill. *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986); *Frazier v. Cast*, 771 F.2d 259, 265 (7th Cir. 1985); *In Re TCI Ltd.*, 769 F.2d 441, 450 (7th Cir. 1985). Although the court finds, in the text of this opinion, that Colan does not raise a genuine issue of

(Footnote continued on following page)

I. Motion for Summary Judgment

On a motion for summary judgment, the moving party has the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Cedillo v. Int'l Ass'n of Bridge and Structural Iron Workers*, 603 F.2d 7, 10 (7th Cir. 1979). In determining whether any material fact remains in dispute, the court must view all inferences in the light most favorable to the non-moving party. *Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986). However, the non-moving party may not merely rely on conclusory pleadings to withstand summary judgment. In responding to a motion for summary judgment, a non-moving party must set forth specific facts in affidavits or otherwise show that there is a genuine issue of material fact that must be decided at trial. *First National Bank of Arizona v. Cities*

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[2] *continued*
material fact in his opposing memorandum, the court does not find that there is absolutely nothing in the evidence to support Colan's argument that Koppers and Eaton entered into a secret agreement to delay the merger of Eaton and Cutler-Hammer, nor does the court find that Colan made no attempt to ascertain whether this argument might have a basis in fact. Therefore, the court denies Koppers' motion for Rule 11 expenses, fees and sanctions.

In addition, because the court grants Koppers' motion for summary judgment, the court denies Colan's motion to set a schedule for the pretrial brief, the pretrial conference and the trial. It is clear that, where one defendant files a motion for summary judgment which the court grants, the district court may *sua sponte* enter summary judgment in favor of additional non-moving defendants if the motion raised by the first defendant is equally effective in barring the claim against the other defendants, and the plaintiff had an adequate opportunity to argue in opposition to the motion. *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 280 (7th Cir. 1986). Thus, although Koppers and Eaton are both defendants in this action, and Koppers alone moves for summary judgment, the court, *sua sponte*, enters summary judgment in favor of Eaton as well as Koppers. Koppers' arguments, that no secret agreement existed and that there was no § 16(b) sale, effectively bar Colan's § 16(b) claim against Eaton, which, in any event, was a nominal party from the start.

Services Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592-93 (1968); *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960, 104 S.Ct. 392 (1983).

Koppers has moved for summary judgment. Therefore, this court must view all inferences in the light most favorable to Colan. Colan contends that there are genuine issues of material fact that preclude this court from granting Koppers' motion for summary judgment. Drawing all reasonable inferences that can be made in Colan's favor, the court finds that there are no genuine issues of material fact and that Koppers is entitled to summary judgment as a matter of law.

II. Facts

A. The Parties

Cutler-Hammer was a Delaware corporation involved in the manufacture of electronic equipment. Cutler-Hammer stock was traded on the New York Stock Exchange. During all times relevant to this action, Edmund B. Fitzgerald was the Chairman and Chief Executive Officer of Cutler-Hammer, and also an outside director of Koppers. The Wisconsin law firm of Michael, Best & Friedrich represented Cutler-Hammer in the negotiation and preparation of both the sale of convertible preferred stock to Koppers and the merger of Eaton and Cutler-Hammer. The investment banking firm of Morgan, Stanley & Co., Inc. represented Cutler-Hammer in the sale of stock to Koppers.

Eaton is an Ohio corporation predominantly engaged in the manufacture of heavy industrial equipment. Eaton stock is traded on the New York Stock Exchange. At all times relevant to this action, Edward Mandell DeWindt was the Chairman and Chief Executive Officer of Eaton. On August 23, 1978, DeWindt became a director of Cutler-Hammer. Robert G. Brown is the former Vice-President of Corporate Development at Eaton, and as such, handled Eaton's acquisitions and divestitures. Brown took notes of several discussions which Colan now alleges evidence a secret agreement between Eaton and Koppers. Brown

also became a Cutler-Hammer director on August 23, 1978. Eaton employed the investment banking firm of Lehman Brothers to accomplish its merger with Cutler-Hammer. Peter G. Peterson, the former Chairman and President of Lehman Brothers, headed the Lehman team hired to assure the successful merger of Eaton and Cutler-Hammer.

Koppers is a Pennsylvania corporation principally engaged in the manufacture of industrial chemicals. Koppers' stock is traded on the New York Stock Exchange. At all times relevant to this action, Fletcher L. Byrom was the Chairman of the Board of Koppers. The investment banking firm of First Boston Corporation represented Koppers in the merger negotiations with Eaton.

B. Koppers' Purchase of Cutler-Hammer Stock in 1978

In March of 1978, Cutler-Hammer learned that Tyco Laboratories, Inc. had begun making large anonymous open market purchases of Cutler-Hammer common stock. On March 19, 1978, Fitzgerald and Byrom, along with others, met in Pittsburgh to discuss whether Koppers would like to purchase Cutler-Hammer stock. Koppers' Board of Directors met on March 27, 1978 to discuss the possible investment in a new issue of Cutler-Hammer convertible preferred stock in the amount of approximately 25 to 30 million dollars. The Koppers Board authorized the investment within certain general guidelines. The Board also authorized, upon completion of the investment, the purchase of additional Cutler-Hammer common stock sufficient for Koppers to hold 20% of Cutler-Hammer's outstanding stock for equity accounting purposes. Fitzgerald did not attend this meeting, and, because of his position as an outside director of Koppers, abstained from any involvement in the subsequent negotiations between Koppers and Cutler-Hammer concerning the possible investment.

On April 8, 1978, the Cutler-Hammer Board of Directors approved the proposed preferred stock sale to Koppers.

On April 9, 1978, the Executive Committee of Koppers' Board reviewed and approved the agreement for the proposed stock purchase. The transaction was closed and the agreement executed on April 10, 1978, when Cutler-Hammer placed an issue of 650,000 shares of convertible preferred Cutler-Hammer stock with Koppers, for a negotiated price of $45 per share. Under the terms of the stock purchase agreement, the preferred dividend rate was the same as the current dividend rate for common stock, the preferred stock was convertible into common stock on a one-for-one basis, and, if converted, the preferred stock represented 9.9% of Cutler-Hammer's outstanding common stock.

After this initial purchase, Koppers began to purchase shares of Cutler-Hammer common stock on the open market. From April 10 until April 14, 1978, Koppers bought 742,500 shares of Cutler-Hammer common stock on the open market at an average price of $44.25 per share. Koppers then held approximately 21 to 22 percent of Cutler-Hammer's stock, if all of the preferred shares were converted to common stock.

On May 31, 1978, Koppers converted 640,000 of its 650,000 shares of convertible preferred shares into common stock. Koppers did not convert all of its preferred shares in order to preserve any special voting rights attached to the class of preferred stock.[3]

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[3] When the Cutler-Hammer Board of Directors approved the preferred stock sale to Koppers on April 7, 1978, its Resolution creating the preferred stock series stated, with regard to voting rights:

> (4) *Voting Rights.* Holders of the Series A [Preferred] Stock shall be entitled to one vote for each share held on all questions upon which shareholders are entitled to vote. Holders of the Series A Stock shall also have the right to vote as a class as provided by the applicable laws of the State of Delaware, and by the certificate of Incorporation of the Corporation.

See Exhibit "4" to Koppers' Memorandum in Support of Motion for Summary Judgment ("Koppers' Memorandum") at 3061.

C. THE MERGER OF EATON AND CUTLER-HAMMER

On June 12, 1978, Eaton purchased Tyco's entire 33% stock interest in Cutler-Hammer—2,105,900 shares of common stock—for $115.8 million, or approximately $55 per share. Thereafter, on June 22, 1978, Eaton announced its plan to make a tender offer for all Cutler-Hammer stock.

The Boards of Directors of Eaton and Cutler-Hammer approved an Agreement and Plan of Merger on June 26, 1978 ("the Agreement"). The Agreement provided for the proposed merger of New CHI and Cutler-Hammer, and the conversion of each common and preferred share of Cutler-Hammer into $58 cash or a fixed-interest bearing subordinated installment note at the election of the stockholder.[4] The Agreement conditioned the merger upon: (1) the approval of Cutler-Hammer's shareholders at a meeting to be held on a mutually agreeable date for Eaton and Cutler-Hammer, but no later than April 30, 1979; (2) an order for the S.E.C. declaring the registration of the Eaton installment notes effective; (3) Cutler-Hammer's filing of a proxy statement with the S.E.C.; (4) approval from the Federal Trade Commission ("F.T.C.")[5] and the Department of Justice; (5) the absence of any litigation, proceeding or investigation, actual or threatened, with regard to the merger; and (6) opinion letters of counsel for both companies and the certificate of Cutler-Hammer's President to be rendered after Cutler-Hammer's shareholders approved the merger.

Pursuant to the Agreement, Eaton issued a tender offer for all outstanding shares of Cutler-Hammer stock on July 17, 1978, at the price of $58 per share. By the con-

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[4] The installment notes Eaton offered were considered "securities"; therefore, Eaton was required to file a Registration Statement for the installment notes with the Securities and Exchange Commission ("S.E.C.").

[5] Eaton and Cutler-Hammer competed in certain product lines; therefore, the F.T.C. requested both to provide the F.T.C. with documents to aid its antitrust investigation.

clusion of the tender offer on August 7, 1978, Eaton had acquired a 62% interest in Cutler-Hammer. Koppers did not tender or otherwise offer to sell its Cutler-Hammer preferred or common stock to Eaton during the period of the tender offer.[6]

As for the required shareholders' meeting, on August 23, 1978, the Cutler-Hammer Board of Directors set the required meeting date for October 2, 1978, but gave the Chairman, Fitzgerald, authority to change the date without further Board action. Subsequently, Fitzgerald postponed the October 2, 1978 meeting date. On October 20, 1978, Fitzgerald set the meeting date for December 14, 1978, with the concurrence of Eaton's Chairman, and on November 6, 1978, a Notice of Special Shareholders' Meeting, Proxy Statement and Form of Proxy were sent to all record shareholders.[7] The shareholders met on December 14, 1978, and approved the merger, subject to the satisfaction or waiver of the remaining closing conditions. Those conditions were satisfied when the merger closed on January 2, 1979. On that date, Koppers sold all of its Cutler-Hammer stock and received $58 per share from Eaton, pursuant to the terms of the merger.

As for the required governmental authorizations, on August 21, 1978, Eaton submitted a draft Registration Statement to the S.E.C. On September 19, 1978, the S.E.C. responded with a multitude of questions and proposed changes. On October 23, 1978, Eaton filed an amended Registration Statement with the S.E.C. The

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[6] In fact, Eaton's tender offer specifically noted that Eaton had no agreement or understanding with Koppers as to the tender offer or otherwise. *See* Exhibit "15" to Koppers' Memorandum at 95.

[7] Koppers returned its signed proxy for its common shares, without designating its vote on the proposed merger, in early December, 1978. *See* Exhibit "20" to Koppers' Memorandum. Koppers did not receive a proxy for its 10,000 preferred shares, which at that time comprised 100% of the outstanding Cutler-Hammer preferred stock class. *See* Exhibit "21" to Koppers' Memorandum at 98.

S.E.C. finally declared the Registration Statement effective on November 3, 1978. As for F.T.C. approval of the merger, the F.T.C. requested Eaton and Cutler-Hammer to provide documents to the F.T.C., and, on October 20, 1978, Eaton made those documents available to the F.T.C. Eaton did not consider that it had the F.T.C.'s approval of the merger until December 14, 1978.

III. Contentions of the Parties

Colan now brings this action under § 16(b) of the Securities Exchange Act of 1934. Section 16(b) prohibits a purchase and sale or sale and purchase of an issuer's stock by officers, directors, or beneficial owners of more than 10% of any class of securities of the issuer within any period of less than six months. Colan alleges that Koppers was an insider and profited from its purchase and sale of Cutler-Hammer stock in 1978, in violation of § 16(b). According to Colan, Koppers and Eaton entered into a secret oral agreement pursuant to which Eaton would defer the Cutler-Hammer shareholder meeting and the closing of the merger in order to shield Koppers from § 16(b) liability, and Koppers would forego the Cutler-Hammer fourth quarter dividend to its shareholders, not interfere with the merger in any way, and sell its stock to Eaton at the merger price when the closing took place. This alleged secret agreement was "effectively sealed" on August 23, 1978, the date of the Cutler-Hammer Board of Directors meeting at which the Board gave Fitzgerald the authority to set the date of the shareholders' meeting. Colan also contends that, by August 23, 1978, the merger was a "substantial certainty" because all significant conditions precedent to the merger were satisfied by that date.

Koppers, on the other hand, denies the existence of a secret agreement with Eaton to defer the date of the merger. Also, Koppers contends that, even if it had made such an agreement with Eaton, the agreement would not constitute a "sale" under § 16(b). In addition, Koppers asserts that the transaction was not within the ambit of

§ 16(b) as a matter of law under the Supreme Court's decision in *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 93 S.Ct. 1736 (1973).[8] Finally, Koppers argues that § 16(b) liability, if any, does not include Koppers' profit from its purchase and sale of the initial 650,000 shares, because prior to that purchase Koppers was not a beneficial owner of 10% of Cutler-Hammer's stock.[9]

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[8] In this order, the court grants Koppers' motion for summary judgment on the bases that there was no secret agreement between Koppers and Eaton to delay the merger, and, even if there were a secret agreement, it did not constitute a § 16(b) sale. Therefore, the court need not, and does not, reach the *Kern* issue. Nor does the court address the question of whether Judge Bua's rejection of Koppers' *Kern* argument in *Colan v. Cutler-Hammer, Inc.*, 516 F. Supp. 1342, 1344-45 (N.D. Ill. 1981), established the law of the case, which this court must follow absent special circumstances. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986).

[9] Although the court need not reach this issue, the court notes that, under *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 96 S.Ct. 508 (1976), the threshold stock purchase that pushes a defendant over the ten percent floor is not a § 16(b) "purchase." Only purchases made after the initial ten percent or more purchase give rise to liability when matched with subsequent sales occurring within six months. *See* Hazen, *The Law of Securities Regulation* 423 (1985).

Also, Colan's reliance on the "deputization" theory, announced by the Supreme Court in *Blau v. Lehman*, 368 U.S. 403, 82 S.Ct. 451 (1962), is misplaced. Cutler-Hammer might have been considered to be a Koppers director, under the deputization doctrine, by virtue of Fitzgerald's positions as Cutler-Hammer's Chairman and a Koppers director. However, Koppers may not be considered to be a Cutler-Hammer director by virtue of Fitzgerald's dual positions. Fitzgerald did not hold the required position of power at Koppers necessary under the deputization doctrine. *See Feder v. Martin Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036, 90 S.Ct. 678 (1970).

Finally, S.E.C. rule 16-b(9), 17 C.F.R. § 240.16b-9 (1986), makes clear that a conversion of stock, such as Koppers' conversion of 640,000 of its preferred shares on May 31, 1978, is not a § 16(b)

(Footnote continued on following page)

IV. The Existence of the Secret Agreement

As stated above, a plaintiff responding to a motion for summary judgment may not merely rely on conclusory pleadings, but must set forth specific facts in evidentiary affidavits or otherwise show that there are genuine, material factual issues that must be decided at trial. The court now finds that Colan's conclusory assertion of the existence of a secret agreement is wholly unsupported and fails to establish a genuine issue of material fact, even when the facts are viewed in the light most favorable to Colan.

In support of his allegation that Eaton and Koppers entered into a secret agreement, Colan points to various notes which allegedly evidence negotiations and an agreement between Koppers and Eaton. Colan also points to the fact that the deferral of the merger closing occurred shortly after the alleged negotiations between Eaton and Koppers as evidence of the secret agreement.

Colan primarily relies on the notes of Peterson of Lehman Brothers,[10] Brown of Eaton,[11] Robert Crease of Eaton,[12] and Paul Miller of First Boston[13] as evidence of the negotiation and consummation of a secret agreement between Eaton and Koppers to delay the merger. However, these notes are equivocal at best as to the negotiation and existence of such a secret agreement. Also, both Peterson and Brown stated under oath in their

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[9] *continued*
sale or purchase. Under Rule 16-b(9), a § 16(b) purchase and sale occurs only when the convertible stock is purchased, and the converted stock sold, within six months. Rule 16-b(9) has been in effect at all times relevant to this lawsuit.

[10] *See* Exhibit "A.23" to Colan's Memorandum in Opposition to Koppers' Motion For Summary Judgment ("Colan's Memorandum").

[11] *See* Exhibit "A.15" to Colan's Memorandum.

[12] *See* Exhibit "A.41" to Colan's Memorandum.

[13] *See* Exhibit "A.19" to Colan's Memorandum.

depositions that their notes reflect internal speculations and "flitting" thoughts, as well as conversations with other officers or bankers concerning business transactions.[14] More importantly, Peterson, Brown, and Miller, again under oath in their depositions, testified that, to the best of their knowledge, there was no agreement between Koppers and Eaton to delay the merger for the purpose of allowing Koppers to retain its § 16(b) profit.[15]

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[14] *See* Exhibit "26" to Koppers' Memorandum at 63; Exhibit "C" to Koppers' Reply Memorandum in Support of Motion for Summary Judgment ("Koppers' Reply Memorandum") at 79-80. Also, Brown testified that he often threw away his notes. *See* Exhibit "C" to Koppers' Reply Memorandum at 16. In addition, Peterson testified that he did not date his notes and could not remember the exact date on which he composed the notes. *See* Exhibit "D" to Koppers' Reply Memorandum at 62-63.

A district court, in a federal summary judgment proceeding, may consider materials beyond the pleadings, including exhibits to affidavits and exhibits made a part of a deposition record. Fed.R.Civ. P. 56(e); *First National Bank Co. v. Insurance Company of North America*, 606 F.2d 760, 766 (7th Cir. 1979). However, the court may only consider evidence and statements that would be admissible at trial and that have probative force. Rule 56(e); *First National*, 606 F.2d at 766. *But see* 10A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure* § 2722 at 60 (2d ed. 1983) (inadmissible documents may be considered by court if not challenged).

The court now finds that the notes of Peterson and Brown would be inadmissible as evidence at trial, in that they are incomplete, unreliable and ridden with hearsay statements. None of the hearsay exceptions, such as the regularly kept business record exception in Fed. R. Evid. 803(6), or the party-opponent admission exception in Fed. R. Evid. 801(d)(2), apply in this case. Therefore, the court has not considered these notes in rendering its decision on the motion for summary judgment. However, even if the notes were admissible as evidence, and the court considered the notes in rendering its decision, the court's decision would remain the same, as the notes do not create an issue of material fact as to the existence of a secret agreement between Koppers and Eaton.

[15] *See* Exhibit "26" to Koppers' Memorandum at 63-64; Exhibit "C" to Koppers' Reply Memorandum at 27; Exhibit "27" to Koppers' Memorandum at 57-58.

It is inconceivable that there could have been such an agreement without their knowledge.

In contrast to Colan's scant, equivocal "evidence" of the negotiation and consummation of a secret agreement between Koppers and Eaton, Koppers points out that every person who had a significant role in the merger of Eaton and Cutler-Hammer, including DeWindt, Byrom, Fitzgerald, Peterson, and Miller, has expressly denied under oath that Koppers and Eaton reached an agreement or understanding with respect to the timing of the merger. The depositions of these individuals demonstrate that, instead of secretly agreeing to delay the merger, Eaton officials considered what Koppers might do to protect its profits, and Koppers communicated to Eaton that it would protect its interests.[16] The depositions also demonstrate, and Colan admits, that Cutler-Hammer desired to delay the merger until January of 1979, at least in part because a new capital gains tax law would take effect at that time.[17] This change would benefit many Cutler-Hammer shareholders, but not Koppers, as Koppers did not qualify for long-term capital gains treatment.

At this point, the court notes the arbitrariness of the date selected by Colan as the date of the secret agreement. No significant event occurred on that date. Yet, Colan asserts that, on August 23, 1978, the secret agreement was "effectively sealed" because, on that date, Eaton allowed the Cutler-Hammer Board of Directors to grant Fitzgerald the authority to unilaterally set the date of the shareholders' meeting. Therefore, Colan contends that August 23, 1978 is the date of the agreement. However, at the same time, Colan asserts that Koppers and Eaton actually entered into the purported agreement prior to August 23, 1978.[18] Although the court appreciates the

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[16] *See, e.g.*, Exhibit "27" to Koppers' Memorandum at 18.

[17] *See* Exhibit "A.2" to Colan's Memorandum at 58; Exhibit "14" to Koppers' Memorandum at 124; Colan's Memorandum at 29.

[18] *See* Colan's Memorandum at 19.

difficulty involved in selecting the date of an alleged secret, unwritten agreement between third parties, the court cannot help but notice that August 23, 1978 conveniently places Colan's suit within § 16(b)'s two-year statute of limitations. Had Colan alleged that a § 16(b) sale occurred before August 5, 1978, such as on the date that the Boards of Eaton and Cutler-Hammer approved the merger agreement (June 26, 1978), his suit would have been barred by that statute of limitations.

On a motion for summary judgment, a court is not required to evaluate every conceivable inference which can be drawn from the evidence, but only reasonable inferences. *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218 (7th Cir. 1985). The court now finds that Colan has failed to present evidence from which this court may reasonably infer that, on August 23, 1978, Koppers and Eaton reached a secret agreement to delay the date of the merger in order to protect Koppers from any § 16(b) liability.

V. The Existence of a "Sale" Under § 16(b)

Even were the court to assume that Eaton and Koppers secretly agreed to defer the merger on August 23, 1978, this agreement would not constitute a "sale" under § 16(b). The Seventh Circuit's recent opinion in *Portnoy v. Revlon, Inc.*, 650 F.2d 895 (7th Cir. 1981), makes this clear.

In *Revlon*, the Seventh Circuit addressed the exact question before this court, whether there was a "sale" of stock within the meaning of § 16(b). In that case, plaintiff Portnoy sued on behalf of Revlon, the surviving corporation in the merger of Revlon and Barnes-Hind Pharmaceuticals, Inc. Portnoy contended that Cooper Laboratories, Inc. realized short-swing profits upon the purchase and exchange of Barnes-Hind stock in 1976. Cooper began purchasing Barnes-Hind common stock in 1972. In 1974, Barnes-Hind concluded that a combination with Cooper would not be in the best interests of Barnes-Hind or its shareholders. Cooper continued to purchase Barnes-Hind stock

through May, 1976. On May 26, 1976, Barnes-Hind sued Cooper in federal court to enjoin Cooper from making any further purchases of Barnes-Hind stock. The court denied Barnes-Hind's request for a temporary restraining order, and shortly thereafter, Barnes-Hind and Revlon executed a Letter of Intent to merge which set forth the procedure for, and prerequisites to, the execution of a formal merger agreement. At that time, Cooper agreed to support the merger.[19] On July 29, 1976, Barnes-Hind and Revlon executed the Merger Agreement which set forth the conditions precedent to the merger. The conditions were satisfied, the merger closed, and the shares exchanged on December 31, 1976.

In his complaint, Portnoy alleged that either the Letter of Intent or the Merger Agreement constituted a § 16(b) "sale." According to Portnoy, because Cooper pledged its stock in support of the Revlon merger, and because the conditions precedent to the closing of the merger were beyond the control of Cooper and required no action on the part of Cooper, Cooper was "irrevocably bound" to exchange its Barnes-Hind stock for Revlon stock no later than July 29, 1976. Therefore, a § 16(b) "sale" occurred no later than July 29, 1976, well within six months of Cooper's May, 1976 purchases of Barnes-Hind stock.

The Seventh Circuit held that neither the Letter of Intent nor the Merger Agreement constituted a contract to sell shares within the scope of § 16(b). In so holding, the court reasoned that a sale occurs when an insider becomes

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[19] Cooper expressed its approval of the merger in three separate documents: (1) an addendum to the Letter of Intent stating that Cooper consented to Barnes-Hind entering into the Letter of Intent; (2) an "Agreement as to Voting" stating that Cooper would present its Barnes-Hind shares at any shareholders' meeting and would vote in favor of the proposed Revlon acquisition; and (3) a letter to Revlon stating that Cooper would not acquire any additional shares of Barnes-Hind or negotiate with third parties for the sale of the business, assets, or all of the shares of Barnes-Hind. *Revlon*, 650 F.2d at 899.

"so irrevocably bound to dispose of his securities so that his rights and obligations [become] fixed and the opportunity for speculative abuse [is] removed." *Revlon*, 650 F.2d at 898. The court found that the Letter of Intent and the Merger Agreement did not irrevocably bind Cooper to exchange its Barnes-Hind stock because (1) Cooper retained the right to unilaterally dispose of its Barnes-Hind shares to unrelated third parties, continuing the potential for speculative trading by an insider, until the merger closed; and (2) the significant conditions precedent to the merger set out in the Merger Agreement were not fulfilled until December, 1976, and nonfulfillment of any of the conditions could have blocked the consummation of the merger.

As in *Revlon*, assuming there was a secret agreement, this agreement did not constitute a "sale" by Koppers of its Cutler-Hammer shares, in the sense of an irrevocable commitment and a fixing of Kooper's rights and obligations. Until January 2, 1979, the date the merger closed, despite the alleged secret agreement, Koopers retained the right to dispose of its Cutler-Hammer stock to unrelated third parties. Also, the significant conditions precedent to the closing were not fulfilled until long after August 23, 1978.

Koopers retained its speculative position as a Cutler-Hammer insider despite the alleged secret agreement to sell its Cutler-Hammer stock to Eaton at the merger closing. In all relevant respects, the alleged secret agreement can be equated with a formal option agreement, which, until exercised, does not constitute a sale, unless the option carries with it rights of ownership. *Colan v. Monumental Corp.*, 713 F.2d 330, 334 (7th Cir. 1983); *Revlon*, 650 F.2d at 901; *Bershad v. McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, 400 U.S. 992, 91 S.Ct. 458 (1971). Unlike the alleged insider in *Bershad*, Koppers did not agree to place the stock in escrow pending the closing of the merger, or grant Eaton an irrevocable proxy to vote the stock effective immediately. Instead, Koppers retained all the rights of stock ownership until the January 2, 1979 merger closing. Therefore, Koppers retained

its right to sell the stock to third parties, and its alleged agreement to sell its Cutler-Hammer stock to Eaton at the merger closing did not constitute a § 16(b) sale.[20]

In addition, it is clear that the significant conditions precedent to the merger "did not become definitely eliminated" until long after August 23, 1978. *Colan v. Brunswick Corp.*, 550 F. Supp. 49, 51-52 (N.D. Ill. 1982). Colan bears the burden of establishing that all significant conditions precedent to the merger were fulfilled within six months of Koppers' purchase of Cutler-Hammer stock. *Revlon*, 650 F.2d at 898. The court now finds that Colan has failed to meet this burden.

The Merger Agreement of June 26, 1978 states that the consummation of the merger was subject to the following significant conditions: (1) lack of litigation with regard to the merger; (2) Cutler-Hammer shareholders' approval of the Merger Agreement at a meeting, the date of which was to be set under Section II of the Merger Agreement; (3) an S.E.C. order declaring effective the necessary Eaton Registration Statement; (4) F.T.C. antitrust clearance of the merger; and (5) the certificate and opinion of Cutler-Hammer's President and Counsel, respectively, to be issued after the shareholders' meeting.[21]

Colan asserts that the requirement that there be no litigation with regard to the merger may not be considered a significant condition precedent to the merger because of Magistrate Lefkow's discovery ruling of September 22, 1983.[22] In that order, Magistrate Lefkow determined the applicability of the attorney-client and work product

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[20] Koppers retained its speculative position as a Cutler-Hammer insider, not only because the secret agreement did not carry with it rights of ownership, but also because the alleged agreement was an oral agreement, and was therefore unenforceable under both the Ohio and Pennsylvania Commercial Codes. *See* Ohio Rev. Code Ann. § 1308.34 (1985 Supp.); 13 Pa. Cons. Stat. § 8319.

[21] *See* Exhibit "13" to Koppers' Memorandum at 268, 283-90.

[22] *See* Exhibit "K" to Koppers' Reply Memorandum.

privileges to a large number of documents. Colan argued that Koppers had waived the attorney-client privilege with respect to certain documents by placing attorney advice at issue. Koppers placed attorney advice at issue, Colan contended, by raising the defense that the threat of litigation was a significant condition precedent to the consummation of the merger. Magistrate Lefkow upheld Koppers' assertion that it had not waived the attorney-client privilege with respect to these documents, because it had not made the advice of counsel the critical issue in the suit. Magistrate Lefkow found that, because Koppers did not raise the threat of litigation as an affirmative defense in its answer, Koppers had not put advice of counsel in issue. Magistrate Lefkow concluded, however, that, by upholding the privilege, the court considered Koppers barred from asserting the threat of litigation as a defense.

Koppers asserts in its motion for summary judgment that the alleged secret agreement was not a § 16(b) sale because, *inter alia*, the significant conditions precedent to the merger, including the lack of litigation, were not fulfilled within six months of the purchase of stock. However, Koppers is not thereby raising the threat of litigation as an affirmative defense, which Koppers would then have the burden of proving. Rather, Cutler-Hammer and Eaton made lack of litigation concerning the merger a condition precedent to the merger; thus, under § 16(b), Colan has the burden of establishing that this condition was met within six months of Koppers' purchase of stock.

Colan has not met its burden of establishing that the threat of litigation was not a significant condition precedent to the closing of the merger. Colan asserts that "[a] review of the testimony of the principal negotiators for the investment banking firms confirms the litigation issue was resolved between the parties long before August 23, 1978." Colan refers to notes of Robert Brown allegedly evidencing an agreement between Lehman Brothers and First Boston under which neither would sue the other without notifying the other in advance.

Koppers concedes that Lehman Brothers and First Boston did agree to notify each other before initiating litigation.[23] However, Koppers contends, and the court now finds, that this was the extent of the agreement; Eaton and Lehman Brothers recognized that Koppers could initiate litigation through December of 1978.[24] Moreover, third parties could have also initiated litigation that could have prevented or delayed the merger.

Colan also asserts that the requirement that the Cutler-Hammer Board set a date for a shareholders' meeting, and that the shareholders vote to approve or disapprove the Merger Agreement, was fulfilled on August 23, 1978. On that date, the Cutler-Hammer Board set the meeting for October 2, 1978, but gave Fitzgerald the authority to change the date without further Board action. Fitzgerald, on October 20, 1978, set the meeting for December 14, 1978. According to Colan, because Fitzgerald was a Koppers director, on August 23, 1978, when he was given the authority to set the date for the shareholders' meeting, Fitzgerald became bound to protect Koppers' interests and to set the date beyond six months from Koppers' last purchase of Cutler-Hammer stock.

However, the court finds that, on August 23, 1978, Fitzgerald was not irrevocably bound to reschedule the date of the shareholders' meeting in order to protect Koppers from § 16(b) liability. Fitzgerald and DeWindt both testified under oath in their depositions that other factors, such as a favorable capital gains tax law change effective January 1, 1979, and the ability of Eaton and Cutler-Hammer to work out financial and legal matters, affected Fitzgerald's decision to postpone the shareholders' meeting, and Eaton's tacit approval of the postponement.[25] In any event, the shareholders' meeting was not

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[23] *See* Koppers' Reply Memorandum at 54-55.

[24] *See* Exhibit "D" to Koppers' Reply Memorandum at 23, 56.

[25] *See* Exhibit "2" to Koppers' Memorandum at 58-59; Exhibit "25" to Koppers' Memorandum at 45-48, 53.

scheduled until October 20, 1978, and the shareholders did not approve the Merger Agreement until the December 14, 1978 meeting. Thus, this condition was not fulfilled on August 23, 1978.

In addition, Colan argues that the S.E.C. approval of Eaton's Registration Statement and the F.T.C. antitrust clearance were not significant conditions precedent to the merger. Colan contends that the approval of the S.E.C. and F.T.C. clearance were not significant because Eaton was a "sophisticated filer," the "boiler plate" terms and conditions of the merger presented no stumbling block to the consummation of the merger, and, in fact, the F.T.C. and Department of Justice inquiries were "mere technicalities." However, the fact remains that the S.E.C. did not declare Eaton's Registration Statement effective until November 3, 1978, and Eaton did not consider that it had F.T.C. approval of the merger until December 14, 1978. Despite Colan's conclusory contention that the S.E.C. and F.T.C. approvals were mere technicalities, under the Merger Agreement, approval from both of these agencies was an actual precondition to the merger and could not be assumed. *See supra* nn.4-5. Had Eaton and Cutler-Hammer failed to secure approval from the S.E.C. or F.T.C., either party would have had the right to withdraw from the merger. Therefore, the court finds these conditions significant, and not fulfilled as of August 23, 1978.

Finally, Colan argues that the opinion of Cutler-Hammer's counsel and the certificate of its president were not significant conditions precedent to the merger, but "merely technical conditions capable of ready completion and without any discernible impediment to their issuance." Also, Colan argues that these conditions are insignificant because Eaton had the ability to waive these conditions, and there is no reason to infer why Eaton would not have readily waived these conditions had they been barriers to a closing. Again, these conclusory statements made with 20/20 hindsight fly in the face of reality. Despite Colan's contention that these conditions were insignificant, it is clear they are not. The Merger Agreement express-

ly conditioned consummation of the merger upon the fulfillment of these conditions, and Eaton at no time waived these requirements. Therefore, these conditions were significant conditions precedent to the merger, and they were not fulfilled until January 2, 1979.

In summary, the court finds that, even if one assumes for the sake of argument that there was a secret agreement between Eaton and Koppers to delay the merger, Koppers retained its speculative position as a Cutler-Hammer insider, and the significant conditions precedent to the merger were not all fulfilled, until the merger closed on January 2, 1979. Koppers was not irrevocably bound to dispose of its Cutler-Hammer shares, with rights and obligations fixed, until that date. Koppers never signed a contract to sell the shares to Eaton, never tendered the shares to Eaton, never pledged its support for the merger or agreed to vote its shares in favor of the merger, and Koppers was not a party to the Eaton/Cutler-Hammer Merger Agreement. In addition, Koppers might have blocked or at least substantially delayed the merger by demanding a class vote of its 10,000 preferred shares.[26]

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[26] Colan argues that Koppers did not have the right to vote its 10,000 preferred shares as a class. Colan points to the fact that Cutler-Hammer did not issue Koppers a proxy for its convertible preferred stock before the vote with regard to the merger. Colan also points to the letter of Frank Pelisek, Cutler-Hammer's counsel, to the S.E.C. regarding the class voting rights of Koppers' convertible preferred stock. *See* Exhibit "A.44" to Colan's Memorandum. In addition, Colan contends that Cutler-Hammer's charter and its amendments do not provide for the issuance of preferred stock with class voting rights.

Koppers contends that it did have the right to vote its preferred shares as a class, pursuant to the Cutler-Hammer Resolution of April 8, 1978. That Resolution provided that preferred stockholders have the right to vote as a class, as provided by the applicable laws of the State of Delaware, and by the certificate of incorporation of the corporation. Cutler-Hammer's certificate of incorporation gives its Board of Directors the authority to fix the voting rights of preferred shares by resolution to the full extent per-

(Footnote continued on following page)

Therefore, even if there were a secret agreement to delay the merger, no § 16(b) sale occurred before January 2, 1978, the date the merger closed.

IV. Conclusion

For the reasons set forth above, the court grants Koppers' motion for summary judgment, denies Koppers' motion to strike, and denies Colan's motion for a pretrial order, pretrial conference and trial schedule.

Enter

[signed] JOHN A. NORDBERG
United States District Judge

Dated: May 23, 1986

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[26] *continued*
mitted by the laws of the State of Delaware. *See* Exhibit "A.55" to Colan's Memorandum at 262, 269. Section 151 of Delaware's General Corporation Law, 8 Del. Laws § 151 (1986), provides that every corporation may create classes of stock with such voting powers as are stated in the certificate of incorporation or in the resolution, adopted by the board of directors pursuant to authority vested in it by the articles of incorporation, providing for the issue of stock. Therefore, neither Cutler-Hammer's certificate of incorporation, nor Delaware's corporate law, prohibit the issuance of a preferred class of stock with the right to vote as a class established in the resolution creating the stock. Consequently, the court finds that, either Koppers did have the right to vote its preferred stock as a class, or, at least, Koppers could have delayed the merger by asserting its right to vote the preferred stock as a class, through litigation or otherwise.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 25, 1987.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

DAVID COLAN,

Plaintiff-Appellant,

No. 86-2013 v.

CUTLER-HAMMER, INC., EATON CORPORATION, and KOPPERS COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 4118
John A. Nordberg, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

Rule 56, Federal Rules Of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material

facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court

shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Section 16(b), Securities Exchange Act Of 1934

78p. Directors, officers, and principal stockholders

(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Supreme Court, U.S.
FILED
JUN 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1864

In The
Supreme Court of the United States
October Term, 1986

DAVID COLAN,

Petitioner,

vs.

CUTLER-HAMMER, INC., EATON CORPORATION, and KOPPERS COMPANY, INC.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts properly applied well-established standards articulated in Rule 56 of the Federal Rules of Civil Procedure and by this Court in determining that the petitioner's wholly unsupported and conclusory assertions were insufficient to defeat a motion for summary judgment.

2. Whether certain fragmentary, hearsay notes which could never be admissible at trial were properly disregarded by the lower courts in their summary judgment inquiries.

3. Whether the lack of an irrevocably binding agreement and the continued existence of significant unfulfilled preconditions to a merger preclude the finding of a "sale" under §16(b) of the Securities Exchange Act of 1934.

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In The
Supreme Court of the United States
October Term, 1986

DAVID COLAN,

Petitioner,

vs.

CUTLER-HAMMER, INC., EATON CORPORATION, and KOPPERS COMPANY, INC.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Procedural History

In August 1980, plaintiff-petitioner David Colan ("Colan") filed a complaint against defendant-respondent Koppers Company, Inc.[1] ("Koppers"), alleging that Koppers had violated Section 16(b) of the Securities Exchange Act

[1] Koppers has no parent or non-wholly owned subsidiary corporations.

of 1934, 15 U.S.C. Sec. 78p(b) in the purchase and sale of securities of Cutler-Hammer, Inc. ("Cutler–Hammer"). Colan alleged that the "sale" occurred less than six months after Koppers' last purchase of stock when Koppers supposedly entered in a "secret agreement" with Eaton Corporation ("Eaton"), which acquired Cutler-Hammer through a merger. (SA. 1) Colan, an Eaton shareholder, sued to recover the profits Koppers eventually realized when it actually sold its Cutler-Hammer stock at the closing of the Eaton/Cutler-Hammer merger, long after any six-month §16(b) period.

In October 1981, Koppers filed a motion for summary judgment and, after three years of extensive discovery by Colan, the parties fully briefed the motion. (SA. 2, 3) On May 23, 1986, the District Court granted Koppers' motion and on February 24, 1987, the Court of Appeals for the Seventh Circuit affirmed. Plaintiff now petitions this Court to grant a Writ of Certiorari.

B. Background of the Case

The factual summary contained in the Petition is misleading in its characterizations of the facts and contains unfounded inferences properly rejected by the District Court and the Court of Appeals. A complete statement of the facts is contained in the District Court's Memorandum Opinion and Order and, therefore, only a brief and accurate statement is required herein.

In March 1978, the Chairman of Cutler-Hammer, Edmund L. Fitzgerald, contacted the Chairman of Koppers, Fletcher L. Byrom, to inquire whether Koppers was interested in investing in Cutler-Hammer. Byrom responded that he would have to speak with the Board of Directors, and on March 27, 1978 the Koppers Board met and approved a purchase of Cutler-Hammer stock. (SA. 4, 6) Fitzgerald, who was also an outside director of Koppers, did not attend the board meeting, nor did he participate in any further negotiations between Koppers and Cut-

ler-Hammer concerning the investment. (SA. 4, SA. 5, p. 39-40)

The Cutler-Hammer Board also approved the purchase and created a special preferred stock series entitled to class voting and other rights. (SA. 8) On April 10, 1978 Koppers purchased 650,000 shares of the new preferred stock at $45 per share. Koppers then purchased 742,500 shares of Cutler-Hammer common stock in the open market between April 10 and April 13 at an average price of $44.25 per share. Later, Koppers converted 640,000 preferred shares to common shares, retaining 10,000 shares of preferred stock to preserve its special voting rights. (SA. 7, p. 137-138, 150, 152)

On June 12, 1978, Eaton purchased approximately 30% of Cutler-Hammer's common stock then held by Tyco Laboratories, at a price of $55 per share. On June 26, 1978, the Boards of Eaton and Cutler-Hammer approved a "merger agreement" which proposed the conversion of each common and preferred share of Cutler-Hammer stock into cash or an interest-bearing installment note, at the shareholder's option.

The Eaton/Cutler-Hammer merger agreement had several preconditions to its completion. Specifically, the merger was conditioned upon: (1) the approval of Cutler-Hammer's shareholders, (2) the approval of a Registration Statement by the Securities and Exchange Commission ("S.E.C."), (3) the filing of a proxy statement, (4) antitrust clearance by the Federal Trade Commission and the Department of Justice, (5) the absence of any litigation with regard to the merger, and (6) opinion letters of counsel for both companies and a certificate of Cutler-Hammer's president. (SA. 17; A. 4, p. 117; SA. 18, p. 128)

On July 17, 1978 Eaton issued a tender offer for all outstanding shares of Cutler-Hammer stock and acquired approximately 62% of Cutler-Hammer's common stock. (A. 33) Koppers did not tender or otherwise offer to sell

to Eaton its Cutler-Hammer preferred or common stock.

On August 23, 1978 the Cutler-Hammer Board of Directors tentatively set the required shareholder's meeting for October 2, 1978. The Board also decided that its chairman, Fitzgerald, could later change the date to allow for flexibility in proceeding with the merger. (A. 4, p. 98) Cutler-Hammer's counsel testified that the arbitrary date of October 2 was "pulled out of the air," and Fitzgerald later postponed the shareholder's meeting until December 14, 1978. (SA. 18, 23)

On December 14, 1978 the Cutler-Hammer shareholders approved the merger, subject to the remaining merger conditions. The merger was closed on January 2, 1979 (more than 8 months after Koppers' last purchase) and, at that time, Koppers received $58 per share for all of its Cutler-Hammer stock. (SA. 26)

During discovery, the plaintiff took the deposition of each person who had a significant role in the Eaton/Cutler-Hammer merger and Koppers' purchase and sale of Cutler-Hammer stock. Each person expressly denied there was any "agreement," secret or otherwise, between Eaton, Koppers and Cutler-Hammer to postpone the merger and prevent Koppers from incurring §16(b) liability. (SA. 28, p.195; 5, p.80)

While the plaintiff has claimed at various times that an "unwritten," "informal" and "secret" agreement was reached by August 23, 1978 (the date the Cutler-Hammer Board met and tentatively set the later shareholder's meeting), Fitzgerald testified that he selected the shareholders' meeting and closing dates without considering Koppers and without discussing the matter with Koppers. (SA. 5, p. 80) Fitzgerald and other persons testified that the primary reason for delaying the meeting and closing date was the appearance and later enactment of a new tax bill, to take effect in 1979, which would benefit long-term Cutler-Hammer shareholders (but not Koppers). (SA. 5, p.67, 134;

A. 2, p.58-59; District Court Opinion, Appendix to the Petition, p. 15a)

In responding to Koppers' motion for summary judgment, Colan relied upon certain fragmentary, handwritten notes prepared by two Eaton advisors, as "evidence" of the negotiation of an alleged "secret agreement" involving Koppers, Eaton and Cutler-Hammer. However, the note-takers testified that the notes were "scribbled . . . for memory joggers," that they contained random thoughts and reflected "internal speculations," as opposed to "statements" by anyone. (SA. 29, p. 62-63) Their unreliability is clearly shown by one author who testified, when asked to "explain" his own note:

> "*I suppose* what it means, *I guess, it's a presumption* that . . . " [quoted in Petition at 8] [Emphasis added.].

After careful examination of the notes, the depositions, and other documents, the District Court found that the "notes" offered by the plaintiff were "incomplete, unreliable and ridden with hearsay statements," and that "none of the hearsay exceptions" could apply. (District Court Opinion, p. 14a, fn. 14)

The District Court held, and the Court of Appeals affirmed, that "Colan's conclusory assertion of the existence of a secret agreement is wholly unsupported and fails to establish a genuine issue of material fact even when the facts are viewed in a light most favorable to Colan." (District Court Opinion, p. 13a) The District Court also determined that even assuming such a "secret agreement" existed, it could not constitute a "sale" under Section 16(b) because (a) Koppers was never obligated to dispose of its stock prior to the actual closing, and (b) significant, unfulfilled preconditions to the merger and any sale remained unfulfilled until well after any potential liability period. Accordingly, the District Court granted Koppers' motion for summary judgment and the Court of Appeals

unanimously affirmed, adopting the District Court's opinion as its own.

REASONS FOR DENYING WRIT

I. THE LOWER COURTS PROPERLY APPLIED WELL-ESTABLISHED STANDARDS ARTICULATED BOTH IN RULE 56 AND BY THIS COURT IN DETERMINING THAT THE PETITIONER'S WHOLLY UNSUPPORTED AND CONCLUSORY ASSERTIONS WERE INSUFFICIENT TO DEFEAT A MOTION FOR SUMMARY JUDGMENT

Rule 56(e) of the Federal Rules of Civil Procedure requires that the non-moving party "may not rest upon mere allegations or denials" but instead must "set forth specific facts showing that there is a genuine issue for trial". Nothing in the recent decisions of this Court cited by the petitioner, *Anderson* v. *Liberty Lobby*, ___ U.S. ___, 106 S. Ct. 2505 (1986), and *Celotex Corp.*v. *Catrett*, ___ U.S. ___, 106 S. Ct. 2548 (1986), calls this well-established standard into question, and it is this standard which the District Court and the Court of Appeals used to find petitioner Colan's allegations insufficient to withstand a motion for summary judgment. More specifically, the lower courts found that Colan failed to produce any even potentially admissible evidence to oppose the strong evidence introduced by respondent Koppers that there was no "secret agreement" which constituted a §16(b) "sale."[2] The lower courts therefore granted and affirmed summary

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[2] Absent such an "agreement," there could be no "sale" for §16(b) purposes. However, even if an "agreement" existed, the District Court determined no sale would have occurred. Thus, petitioner's claim that:

> "If the parties did reach such an agreement within the statutory limit of §16(b) liability, then liability for short swing profits would attach."

(Petition at 14), is patently erroneous and ignores the alternative holdings of the lower court. See, Section III, *infra*.

judgment, applying the traditional standards established by the Federal Rules and articulated by this Court.

Petitioner alleges that the District Court and the Seventh Circuit, in deciding the summary judgment motion, "weighed competing evidence" and "resolved credibility issues". (Petition at 15) Petitioner further asserts that the lower courts' decision signals a "confusion" over the proper application of summary judgment standards set forth by this Court in *Anderson* v. *Liberty Lobby, supra*, ___ U.S. ___, 106 S. Ct. 2505 (1986), which decision's language was "misunderstood" by the lower courts. (Petition at 14). However, the District Court did not "weigh the evidence," judge its "credibility" or "misunderstand" anything. Instead, the court examined the evidence and found that petitioner Colan's submission of notes, which the court found to be "incomplete, unreliable and ridden with hearsay statements," did not constitute a sufficient showing to defeat respondent's motion for summary judgment. The District Court clearly and properly stated:

> "On a motion for summary judgment, the moving party has the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. [citation] In determining whether any material fact remains in dispute, the court must view all inferences in the light most favorable to the non-moving party. [citation] However, the non-moving party may not rely on conclusory pleadings to withstand summary judgment. In responding to a motion for summary judgment, a non-moving party must set forth specific facts in affidavits or otherwise show that there is a genuine issue of material fact that must be decided at trial. *First National Bank of Arizona* v. *Cities Services Co.*, 391 U. S. 253, 289, 88 S. Ct. 1575, 1952-93 (1968). . . ."

(District Court Opinion, p. 5a-6a) Similarly, the Court of Appeals set forth the same standard in affirming, stating, "We agree with the district court that after drawing all rea-

sonable inferences in the light most favorable to the plaintiff [citation], no genuine issues of material fact exist." (Petition's Appendix, p.2a)

These findings contradict any notion that the lower courts "construed *Liberty Lobby* as an invitation to weigh competing evidence and resolve disputed fact issues." (Petition at 15). Indeed, the District Court's decision was issued a month prior to this Court's decisions in *Celotex* and *Liberty Lobby*. The lower courts only engaged in the normal summary judgment inquiries of determining whether there existed a genuine issue of material fact in the circumstances of this case. Finding none, both courts determined summary judgment would be proper. The present case fails to present any unique or appropriate reason to grant certiorari.

II. FRAGMENTARY NOTES "RIDDEN WITH HEARSAY" WHICH WOULD NEVER BE ADMISSIBLE AT TRIAL WERE PROPERLY DISREGARDED BY THE LOWER COURTS IN DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED

In opposing Koppers' motion for summary judgment, petitioner Colan produced certain handwritten notes from Eaton advisors. However, as the notes' authors testified, they are incomplete and unreliable, reflecting "internal speculations and 'flitting' thoughts." (District Court Opinion, p. 14a). Moreover, often the notes contain fragments of information from conversations between people other than the note's author. Such double and triple hearsay could never be admissible as evidence at trial. Therefore, the lower courts properly disregarded this alleged "evidence" in their summary judgment inquiries.

An example of this unreliable, inadmissible evidence is a note written by Robert Brown, an Eaton advisor, which petitioner claims shows the negotiation of a secret agreement between Koppers and Eaton. The note is actu-

ally brief words of part of a conversation between Peterson, another Eaton advisor, and Miller, a Koppers advisor. Moreover, Brown did not hear this conversation directly but instead was informed of it by still another person. (A.15, p.1638-41) Although under *Celotex* a nonmovant is not required to produce evidence in a present form that would be admissible at trial, 106 S.Ct. at 2553, even the petitioner concedes the evidence must be admissible *at some point* to be considered by the court. (Petition at 19) However, the "evidence" petitioner presented, like the triple hearsay above, could never be admissible and therefore was properly disregarded by the lower courts.[3] Indeed, petitioner has now apparently abandoned any contention that the notes were admissible under any exception to the hearsay rule.

The lower courts' determination on the notes does not evidence "confusion over the form of evidence the nonmovant must produce in opposition" or a misapplication of *Celotex*, as petitioner claims. (Petition at 20) The lower courts were fully aware of, and properly applied, well-established standards, with which this Court's recent decisions are fully compatible. As stated in *Liberty Lobby*, "if evidence is merely colorable or is not significantly probative, summary judgment may be granted". *Id.* at 2511.

Clearly, evidence which consists entirely of incoherent, virtually undecipherable, and hearsay handwritten notes is not "significantly probative" to withstand a motion for summary judgment. Therefore, the lower courts correctly followed the clear, well-established standards set

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[3] Petitioner's claim that he "could call each of the authors to the stand" and thereby make the contents admissible is nonsense. First, the authors could not even interpret, much less recall their notes. Second, each of the authors expressly *denied* any "secret agreement"- - the interpretation which the plaintiff seeks.

forth in Rule 56 and by this Court.[4]

III. THE LOWER COURTS PROPERLY RULED THAT NO "SALE" BY KOPPERS FOR §16(b) PURPOSES OCCURRED ON THE ALLEGED SALE DATE, WHERE KOPPERS WAS NOT IRREVOCABLY BOUND TO SELL AND WHERE SIGNIFICANT CONDITIONS REMAINED UNFULFILLED

Although the lower courts found no evidence of any alleged "secret agreement" between Koppers and Eaton, they went on to further hold that even if there had been such an agreement, there still would not have been a "sale" for §16(b) purposes. More specifically, the courts found that Koppers was not "irrevocably bound" to dispose of its stock on petitioner's alleged sale date, that significant conditions remained open, and thus no sale could have taken place. In so finding, the District Court and Court of Appeals were fully in accord with other decisions in the Seventh Circuit and other circuits, and no "conflict among the circuits" exists as petitioner now claims.

In support of its finding that Koppers was not irrevocably bound to sell its stock to Eaton the District Court

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[4] It should be noted that the District Court did in fact examine this "merely colorable" evidence and found that even if it had been admissible it still did not "create an issue of material fact as to the existence of a secret agreement between Koppers and Eaton." (District Court Opinion, p. 14a, fn. 14). When reviewed without petitioner's unfounded characterizations, the notes were not inconsistent with the deposition testimony of the participants in the merger negotiations who *all* testified that no secret agreement existed. At most, the notes show concern over whether Koppers might attempt to block or delay the merger through litigation. However, such concern is certainly not evidence of any type of negotiations or agreement between Koppers and Eaton. Thus, even if petitioner's "evidence" is considered, which it should not be, it still does not create an issue of material fact to defeat Koppers' summary judgment motion.

stated,

> "Koppers never signed a contract to sell the shares to Eaton, never pledged its support for the merger or agreed to vote its shares in favor of the merger and Koppers was not a party to the Eaton/Cutler-Hammer Merger Agreement."

(District Court Opinion, p. 23a) In finding no sale because of no irrevocably binding agreement, the lower courts properly followed *Portnoy* v. *Revlon, Inc.*, 650 F.2d 895 (7th Cir. 1981), *Riseman* v. *Orion Research, Inc.*, 749 F.2d 914, 918-919 (1st Cir. 1984) and *Provident Securities Co.* v. *Foremost-McKesson, Inc.*, 506 F.2d 601, 607 (9th Cir. 1974), *cert. denied*, 423 U.S. 1077 (1976). Like the defendant in *Revlon*, Koppers was free to sell its shares until after the §16(b) liability period and, therefore, the District Court was not "rejecting precedent," as petitioner now claims, in granting Koppers' motion for summary judgment.

The decision below was further consistent with *Riseman* and *Provident Securities* in determining whether, on the specific facts alleged, significant preconditions to the merger remained unfulfilled. Although petitioner attempts to dismiss these particular conditions as "insignificant" or "technicalities", the District Court properly found these particular conditions were significant and remained open until after the potential §16(b) liability period was long past.

For example, the absence of threat of litigation remained an open merger precondition until the closing. All of the evidence demonstrated only an informal agreement between the advisors of Koppers and Eaton that they would notify one another before commencing litigation; there was *no evidence* of an agreement whereby Koppers would not sue to block the merger. As stated by the District Court, "Eaton . . . recognized that Koppers could initiate litigation through December of 1978." (District Court Opinion, p. 21a). Moreover, parties other than Kop-

pers could have sued at least until the date of the Cutler-Hammer shareholders meeting in December, 1978. In short, the requirement of lack of litigation remained an open condition until long after the petitioner's alleged "sale date" of August 23, 1978.[5]

Petitioner dismisses all of the preconditions as "insignificant" and then asserts that the lower courts ignored precedent in granting summary judgment. However, these conditions were in fact significant, and as such no sale can take place under §16(b). The lower courts properly followed well-established precedent in granting and affirming Koppers' motion for summary judgment. The precedent as to what constitutes a "sale" is clear and was followed by the district and appellate courts.

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[5] Another significant and unfulfilled condition was the requirement of S.E.C. approval, which petitioner claims was "routine" and "in the hands of Eaton". (Petition at 3) In fact, the S.E.C. returned Eaton's initial application with numerous comments and changes, and approval was not granted until November 3, 1978.

Similarly, the requirement of F.T.C. approval was not an insignificant technicality but instead an explicit, unfulfilled condition as of the date of the alleged secret agreement, August 1978. The F.T.C. directed Eaton and Cutler-Hammer to submit for review certain documents before granting antitrust clearance, and Eaton did not submit the documents until October 20, 1978. F.T.C. approval was not assumed until early December 1978. Like S.E.C. approval, F.T.C. approval was necessary to the merger and not assured until long after any potential §16(b) liability for Koppers.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 19, 1987